DOCUMENT RESUME

ED 460 598 EF 005 353

AUTHOR	Ford, Jeffrey A.; Salazar, Terry L.; White, Gary L.
TITLE	Construction Procurement Handbook for Texas School Districts and Institutions of Higher Education.
PUB DATE	1997-00-00
NOTE	51p.; Produced by Ford Yungblut White & Salazar P.C.
AVAILABLE FROM	Web site: http://www2.outer.net/agctbb/75thlegislature.
PUB TYPE	Guides - Non-Classroom (055)
EDRS PRICE	MF01/PC03 Plus Postage.
DESCRIPTORS	Elementary Secondary Education; *Guidelines; Higher Education; Public Schools; Purchasing; *School Construction; School Districts; *State Legislation
IDENTIFIERS	*Contract Management; Texas

ABSTRACT

Texas legislation allows public school districts to use a variety of contracting methods to obtain the "best value" for their construction projects. This resource document provides some of the basic framework regarding laws governing the award of construction contracts by school districts and institutions of higher education. Also provided are Contracting Method Summary Sheets that summarize the various authorized contracting methods. Specific topics for both public schools and higher education institutions address competitive bidding for construction services, competitive sealed proposals for construction services, construction manager-agent contracts, construction manager-at-risk contracts, design-build contracts, and job order contracts for facilities repair. Appendices contain the provisions of Texas legislation relative to construction contracting for school districts and higher education institutions. (GR)

Reproductions supplied by EDRS are the best that can be made
from the original document.

CONSTRUCTION PROCUREMENT HANDBOOK

FOR

TEXAS SCHOOL DISTRICTS

AND

INSTITUTIONS OF HIGHER EDUCATION

ED 460 598

Copyright © 1997 by Ford Yungblut White & Salazar P.C.

No claim to original government works

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☒ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY
Jeffrey A. Ford
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

TABLE OF CONTENTS

1

I. INTRODUCTION

A. Texas School Construction Contracting Prior to 1995

B. School Construction after Senate Bill No. 1

C. School Construction after Senate Bill No. 583

II. CONSTRUCTION CONTRACTING FOR SCHOOL DISTRICTS

A. Competitive Bidding for Construction Services

B. Competitive Sealed Proposals for Construction Services

C. Construction Manager-Agent Contracts

D. Construction Manager-at-Risk Contracts

E. Design-Build Contracts

F. Job Order Contracts for Facilities Repair

III. CONSTRUCTION CONTRACTING FOR INSTITUTIONS OF HIGHER EDUCATION

EF 005 353

BEST COPY AVAILABLE

A. Competitive Bidding

B. Competitive Sealed Proposal for Construction Services

C. Construction Manager-Agent Contracts

D. Construction Manager-at-Risk Contracts

E. Design-Build Contracts

F. Job Order Contracts for Facilities Repair

IV. CONTRACTING METHOD SUMMARY SHEETS

A. School Districts

B. Institutions of Higher Education

Appendix 1 - Chapter 44, Subchapter B, Tex. Educ. Code

Appendix 2 - Chapter 51, Subchapter S, Tex. Educ. Code

Appendix 3 -Section 61.003, Tex. Educ. Code (Definitions)

Appendix 4 -Section 51.907, Tex. Educ. Code (deleted by S.B. 583)

Appendix 5 - Prof. Svcs. Proc. Act, Chapter 2254, Tex. Govt. Code

Appendix 6 - Art. 249a, Regulation of Practice of Architecture

Appendix 7 - Art. 3271a., Texas Engineering Practice Act

Appendix 8 - Section 2253.021, Tex. Govt. Code

Appendix 9 - Chapter 271, Subchapter B, Tex. Loc. Govt. Code

I. INTRODUCTION

A. TEXAS SCHOOL CONSTRUCTION CONTRACTING PRIOR TO 1995

Prior to 1995, public school districts and institutions of higher education (i.e., junior colleges, community colleges, senior colleges, universities, medical schools, etc. See Appendix 3 for complete definition.) were required to utilize competitive bidding for the award of their construction contracts. These public owners were permitted to award construction management contracts in connection with the construction of school projects; however, the construction manager was prohibited from self-performing or bidding on any of the actual construction work for the project. Additionally, design-build contracts were not permitted to be utilized for the construction of school projects.

B. SCHOOL CONSTRUCTION AFTER SENATE BILL NO. 1

In 1995, the Texas Legislature passed Senate Bill No. 1, an omnibus public education reform bill, intended to decentralize authority and return control of the management of schools to the local school districts. S.B. 1 added a new section (Section 44.031) to the Texas Education Code, modifying the basic purchasing statutes for school districts and introducing the concept of "best value procurement" for contracts of $25,000 or more. School districts were granted the flexibility of choosing any of a list of available methods of contracting that included competitive bidding, competitive sealed proposals, request for proposals, catalogue purchase procedures, interlocal contracts, or design-build contracts.

Before the passage of S.B. 1, school districts were required to award construction contracts to the responsible bidder offering the lowest price. S.B. 1 departed from that traditional basis for awarding contracts by allowing school districts to use any of a variety of different contracting methods to obtain the "best value" for the school district. In determining what constitutes the "best value" to the district, in addition to the purchase price, school districts may consider the following additional factors:

- the reputation of the vendor and of the vendor's goods or services;
- the quality of the vendor's goods or services;
- the extent to which the goods or services meet the district's needs;
- the vendor's past relationship with the district;
- the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses;
- the total long-term cost to the district to acquire the vendor's goods or services; and
- any other relevant factor that a private business entity would consider in selecting a vendor.

In utilizing these various methods of contracting, school districts are now permitted to consider any of the aforementioned discretionary evaluation factors in determining to whom to award a contract. Although the

passage of S.B. 1 achieved the legislative purpose of affording school districts much greater flexibility in how they contracted, the new legislation did not provide adequate guidance to the school districts on what procedures should be utilized to implement the various available contracting methods. This lack of legislative guidance prompted a series of Attorney General Opinion Requests seeking clarification and underscoring the need for further direction from the Texas Legislature.

C. SCHOOL CONSTRUCTION AFTER SENATE BILL NO. 583

The 1997 Texas Legislature has passed Senate Bill No. 583, which becomes effective September 1, 1997. The legislation establishes more specific procedures for school districts to follow in utilizing design-build contracts and establishes procedures for school districts to follow in entering into contracts with construction managers-agents, construction managers-at-risk, contractors pursuant to competitive sealed proposals, contractors pursuant to competitive bidding, and job order contracts. Additionally, S. B. 583 expanded the availability of these various contracting methods by authorizing institutions of higher education to enter into these various types of contracts pursuant to procedures that essentially mirror those required of school districts.

The purpose of this handbook is to provide the reader with an initial source of information regarding the construction contracting methods applicable to school districts and institutions of higher education as a result of the changes in law implemented by the 1997 Texas Legislature. This handbook is not intended to address every issue that may arise in connection with the award of contracts by school districts and institutions of higher education and it is not designed to be a substitute for sound legal advice. Rather, this handbook is intended to provide you with a basic framework of information regarding the laws governing the award of construction contracts by school districts and institutions of higher education that will be effective as to a contract for which requests for bids, requests for proposals, or requests for qualifications are published on or after September 1, 1997.

In using this handbook, you will notice that it is divided into two sections:

1. Construction Contracting For School Districts; and

2. Construction Contracting For Institutions of Higher Education.

Also provided are Contracting Method Summary Sheets that summarize the various contracting methods authorized for school districts and institutions of higher education. Finally, set forth in Appendices are the provisions of Senate Bill No. 583, as incorporated into their respective chapters of the Texas Education Code, along with the pertinent parts of other important statutes that are referenced in S.B. 583.

II. CONSTRUCTION CONTRACTING FOR SCHOOL DISTRICTS

A. COMPETITIVE BIDDING FOR CONSTRUCTION SERVICES

Competitive bidding has been the traditional method by which school districts have selected contractors to build projects. S.B. 1 authorized school districts to utilize several different methods for procurement of construction contracts, but (according to a Texas Attorney General Opinion) did not change the process of competitive bidding if competitive bidding was selected as the contract method. Section 2 of S.B. 583 adds a new Section 44.040 to the Education Code, which retains the concept of selecting a contractor through competitive bidding, but makes some changes in competitive bidding procedures.

Foremost is the change embodied in new Section 44.040(c), which provides that the school district should award to the bidder offering the "best value" according to the selection criteria established by the school district. This is a fundamental change from the concept of being required to award to the lowest bid. The lowest price alone may not necessarily offer the "best value", depending on the criteria the school district adopts. Those criteria may include any of the following criteria listed in Section 44.031(b):

- the purchase price;
- the reputation of the vendor and of the vendor's goods or services;
- the quality of the vendor's goods or services;
- the extent to which the goods or services meet the district's needs;
- the vendor's past relationship with the district;
- the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses;
- the total long-term cost to the district to acquire the vendor's goods or services; and
- any other relevant factor that a private business entity would consider in selecting a vendor.

A school district may choose to make price the primary or even sole criteria if it determines that price will provide the "best value"; but is not compelled to do so, as has been the case under the traditional Texas competitive bidding procedures.

New Section 44.040(b) states that certain sections of the Local Government Code (which address competitive bidding on certain public works contracts) will apply to contracts competitively bid by school districts. (See Appendix 9 for text of these sections.) It is noteworthy that Section 271.027(b) of the Local Government Code was purposely omitted from the provisions made applicable to competitive bidding by school districts under this new Section of the Education Code. Section 271.027(b) of the Local Government Code is the provision that requires the contract to be awarded to the lowest responsible bidder and provides for a hearing if the contract is going to be awarded to a bidder who is not the lowest bidder. The intentional omission of this provision of the Local Government Code from the new school district competitive bidding procedures, coupled with the requirement to award the contract at the bid amount, to the bidder offering the "best value" in relation to the school district selection criteria, eliminates the necessity of awarding to the lowest bidder; but does require that the successful bidder's contract be at the amount bid by the successful bidder (i.e., not a negotiated contract amount as would be allowed in the competitive sealed proposal process).

Under the competitive bidding process, and unlike the new competitive sealed proposal process, the school district is not authorized to discuss the bids with bidders for purposes of securing clarifications and changes or to negotiate with the selected bidder for cost reductions in the price of the contract to be awarded by the school district. As indicated above, once the school district selects the successful bidder, the contract is to be let at the "bid amount" (Section 44.040(c)).

Notice of the bid deadline and place where bids are to be received must be advertised in the county where the school district's central administrative office is located at least once a week for at least two weeks before the deadline for receiving bids if the contract is for $25,000 or more. Competitive bids under the new law must be opened publicly. The safety record of a bidder may also be considered by the school district (Section 271.0275 of the Local Government Code) as part of its selection criteria.

The contract amounts that trigger bonding requirements were unchanged by the Texas Legislature in 1997. A payment bond is still required on public works contracts in excess of $25,000 and a performance bond is required for public works contracts in excess of $100,000. However, House Bill No. 3158 ("H.B. 3158") amended Article 7.19-1 of the Texas Insurance Code to impose stricter requirements concerning the surety companies authorized to issue surety bonds given to public owners on public works projects pursuant to the requirements of Chapter 2253 of the Texas Government Code. Under the provisions of the new subsection (c) of Article 7.19-1 of the Texas Insurance Code, if the amount of the bond (whether payment or performance) exceeds $100,000, then the surety must also hold a certificate of authority from the United States Secretary of the Treasury to qualify as a surety on obligations permitted or required under Federal Law; or have obtained reinsurance for any liability in excess of $100,000 from a reinsurer that is authorized and admitted as a reinsurer in the State of Texas and who is a holder of a certificate of authority from the United States Secretary of the Treasury to qualify as a surety or reinsurer on obligations permitted or required under Federal Law. Public owners and contractors may rely upon the Treasury list of companies holding certificates of authority that is published in the *Federal Register* by the U.S. Department of the Treasury covering the date on which the bond was executed in determining whether the surety on the bond or the reinsurer holds a certificate of authority in compliance with the aforesaid new requirement for bonds in excess of $100,000.

B. COMPETITIVE SEALED PROPOSALS FOR CONSTRUCTION SERVICES

Under the competitive sealed proposals procurement method, the school district selects or designates an Architect/Engineer to prepare construction documents for the project. The school district then issues a Request For Proposals ("RFP") for construction of the project based on contractor selection criteria established by the school district. Selection of the contractor is to be based on a combination of price and other selection criteria determined to provide the best value to the school district. S.B. 1 introduced the concept of competitive sealed proposals (Section 44.031(a)(2) of the Education Code), but did not provide any detail as to the procedures that a school district should follow when utilizing this contracting method. S.B. 583 fills that void by setting forth procedures a school district shall use in selecting a contractor for construction services by competitive sealed proposals.

Section 2 of S.B. 583 adds a new Section 44.039 to the Education Code that sets forth the procedures that a school district must follow in selecting a contractor for construction, rehabilitation, alteration or repair services for a school district facility. The process involves basically four steps and allows an optional prequalification step.

The first step is for the school district to select or designate an engineer or architect to prepare construction documents for the project. If the engineer or architect is not a full-time employee of the school district, the school district must select an engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004 of the Texas Government Code. (Professional Services Procurement Act set forth in Appendix 5).

The second step, which could be done during, before or after completion of the construction documents, is for the school district to prepare a RFP which will include the following information:

- construction documents,
- selection criteria,
- estimated budget,
- project scope,
- schedule, and
- other information that contractors may require to respond to the RFP.

Section 44.039(d) requires the school district to set forth its contractor selection criteria in the RFP. Selection criteria may include the following:

- price (which could, depending on the school district's desires, include a lump sum or percentage fee, general conditions, a guaranteed maximum price, a lump sum bid or no guaranteed maximum price at all),
- experience,
- past performance,
- safety record,
- proposed personnel,
- methodology, and
- other factors demonstrating the capability of the offeror.

School districts are required to advertise in the county in which the school district's central administrative office is located the time by when and place where proposals will be received at least once a week for at least two weeks before the deadline for receiving the proposals.

Prequalification of offerors before proposals are submitted is an optional step for the school district. The new law provides that a prequalified offeror may be rejected later on the basis of subsequently developed information. A failure to prequalify will not bar an offeror from responding and being found by the school district to offer the best value to the school district.

Under Section 44.039(f), the school district is required to (1) receive and publicly open the proposal and (2) to read aloud the names of the offerors and the monetary proposals, if any, stated in each proposal. Under Section 44.035(b), the school district may discuss proposals with offerors after the opening, to allow for clarification and changes. Thus, the major difference between the competitive sealed proposal method and traditional competitive bidding is that post-bid negotiations may take place and a contract may be awarded at a price or on terms different than those originally submitted. In a traditional competitive bidding situation, the school district must award, if at all, to one of the bidders on the exact same basis as was originally bid.

The statute provides that the school district shall take steps to prevent non-monetary information from competing proposals being disclosed to other offerors. The school district has forty-five days after the proposal opening to evaluate and rank each proposal submitted in relation to its published selection criteria.

The final step is for the school district to select the offeror that offers the best value based on its published selection criteria and its ranking of the proposals. Then, under Section 44.039(g), the school district and its architect or engineer may discuss options with the selected offeror for cost reduction. If the school district is unable to come to terms with the first ranked offeror, discussions are to terminate and the district must proceed to the next ranked offeror and repeat the process until a contract agreement is reached or all proposals are rejected.

Both Sections 44.035(a)) and 44.039(h) make it clear that in determining the "best value" the school district is not limited to price, but may consider a combination of all the other factors stated in its published selection criteria.

Section 44.039(c) requires that the school district provide or contract for, independent of the contractor, the inspection, materials testing and verification testing services necessary for acceptance of the facility by the school district.

C. CONSTRUCTION MANAGER-AGENT CONTRACTS

S.B. 583 added Section 44.037 to the Texas Education Code, expressly authorizing school districts to use the construction manager-agent contract method for construction, rehabilitation, alteration, or repair of a facility.

Section 44.037(b) defines a construction manager-agent as a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the school district regarding construction, rehabilitation, alteration, or repair of a facility. A construction manager-agent is intended to represent the school district in a fiduciary capacity and may not self-perform any portion of the actual design or construction of the project, with the exception of the general conditions as provided by the contract. Section 44.0315(6) defines "general conditions", when used in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility, to mean on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials.

Once a school district has determined that the construction manager-agent contract method provides the "best value" to the school district and before or concurrently with selecting the construction manger-agent, the school district must select or designate an engineer or architect for the preparation of the design and the construction documents for the project. This architect or engineer shall have full responsibility for complying with the statutes governing the practice of architecture (Article 249a, V.T.C.S. set forth in Appendix 6) and engineering (Article 3271a, V.T.C.S. set forth in Appendix 7), as applicable. If the architect or engineer is not a full-time employee of the school district, then the school district must select the architect or engineer who will be responsible for preparation of the design and construction documents on the basis of demonstrated competence and qualifications in accordance with the procedures set forth for contracting for professional services of architects or engineers in Section 2254.004 of the Texas Government Code.

School districts are required to select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner as they are required to select engineers or architects. In selecting a construction manger-agent, the school district is required to utilize the same two-step process set forth in Section 2254.004 of the Texas Government Code that is

utilized for the selection of architects or engineers. The school district must:

(1) first select the most highly qualified provider of construction manager-agent services on the basis of demonstrated competence and qualifications; and

(2) then attempt to negotiate with that provider a contract at a fair and reasonable price.

If a satisfactory contract cannot be negotiated between the school district and the most highly qualified provider of construction manager-agent services, then the school district must:

(1) formally end negotiations with that provider;

(2) select the next most highly qualified provider; and

(3) attempt to negotiate a contract with that provider at a fair and reasonable price.

If a school district chooses the construction manager-agent method for construction of a school project, then the school district must also obtain a general contractor, trade contractor(s), or subcontractor(s) to serve as the prime contractor(s) for their specific portion(s) of the work on the project. The general contractor, trade contractor, or subcontractor must be obtained through contracting methods that are in accordance with applicable law (i.e., any of the contracting methods authorized by Section 44.031).

Finally, the school district has the option of obtaining inspection and testing services independently or through the construction manager-agent. Regardless of whether the school district, or the construction manager-agent on behalf of the school district, is the party contracting for the inspection and testing services, all of the testing of construction materials engineering, inspection services, and verification testing services necessary for acceptance of the facility by the school district must be procured in accordance with the two step procurement process set forth in Section 2254.004 of the Texas Government Code, as discussed above.

D. CONSTRUCTION MANAGER-AT-RISK CONTRACTS

In addition to the construction manager-agent method of contracting, S.B. 583 expressly authorized school districts to use the construction manager-at-risk method for contracting for the construction, rehabilitation, alteration, or repair of facilities. However, the procedures for selection of a construction manager-at-risk and the scope of work covered by such a contract are substantially different from those for a construction manager-agent.

A construction manager-at-risk is intended to assume the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price in the same manner as a general contractor; but also provides consultation to the school district regarding construction during and after the design of the facility. The school district must, before or concurrently with selecting a construction manager-at-risk, select or designate an architect or engineer who will be responsible for the preparation of the design and construction documents for the project. This architect or engineer, who will have full responsibility for compliance with the applicable statutes governing the practice of engineering (Article 3271a, V.T.C.S.) and architecture (Article 249a,

V.T.C.S.) as applicable, if not a full-time employee of the school district, must be selected on the basis of demonstrated competence and qualifications utilizing the two-step process set forth in Section 2254.004 of the Texas Government Code.

In selecting the construction manager-at-risk, the school district is required to utilize the competitive sealed proposal process. The school district must prepare a Request For Competitive Sealed Proposals ("RFCSP") that includes the following:

- general information on the project site,
- project scope,
- schedule,
- selection criteria,
- estimated budget,
- the time and place for receipt of proposals, and
- any other information that may assist the district in its selection.

The RFCSP may require offerors to submit information regarding the construction manager's proposed fee and the price for fulfilling the general conditions. The selection criteria for evaluating the proposals and selecting the best offeror must be stated in the RFCSP. The selection criteria may include the following:

- proposed fee and price for general conditions,
- the offeror's experience,
- past performance,
- safety record,
- proposed personnel and methodology, and
- any other factors demonstrating the capability of the construction manager.

The school district has the option of prequalifying potential offerors before proposals are submitted in response to the RFCSP. S.B. 583 does not give specific guidance on what procedures should be utilized for prequalification; however it is clear that prequalification may not be a conclusive determination that an offeror offers the best value to the school district. Similarly, a prequalified offeror may be rejected on the basis of subsequently discovered information. Additionally, the failure to prequalify apparently does not bar a potential offeror from subsequently submitting a proposal, nor does it prevent the school district from subsequently determining that such an offeror offers the best value to the school district as a construction manager-at-risk.

Pursuant to the requirements of Section 44.031(g), the school district is required to publicly advertise the time by when and place where the proposals for construction manager-at-risk services will be received. This public notice must be published in the county in which the school district's central administrative office is located, once a week for at least two weeks before the deadline for receipt of proposals.

After the deadline for receipt of proposals has expired, the school district is required to publicly open and read aloud the names

of the offerors and the monetary proposals, if any, for each proposal. The school district is then required to evaluate and rank each proposal submitted based upon the selection criteria set forth in the RFCSP. This evaluation and ranking by the school district must be completed within forty-five days after the date of the opening of proposals. The school district shall select the offeror that offers the best value to the school district based upon the ranking evaluation performed pursuant to the selection criteria published in the RFCSP. If the school district is unable to negotiate a contract agreement with the selected offeror, the school district must terminate further discussions and then proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected. S.B. 583 does not specify what type of pricing (i.e., firm fixed price, cost plus fixed fee, cost plus fixed fee with guaranteed maximum price, etc.) should be utilized in the contract between the school district and the construction manager-at-risk. The school district may utilize any form of pricing it deems appropriate (i.e., lump sum, cost plus a fee with or without a guaranteed maximum price, flat fee or percentage fee, etc.).

The construction manager-at-risk does assume the contractual risk for completion and delivery of the completed facility at the contracted price in the same manner as a general contractor. However, the construction manager-at-risk is initially responsible for self performing only the general conditions and any minor work that may be included in the general conditions for the project. The "general conditions" for the project are defined in Section 44.0315(6) to mean on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials.

The construction manager-at-risk is required to publicly advertise and solicit either competitive bids or competitive sealed proposals from trade contractors or subcontractors for the performance of all major elements of the work on the project other than the general conditions. The construction manager-at-risk is permitted to seek to perform portions of the work required to be publicly advertised. If the construction manager-at-risk submits its own bid or proposal for any of these portions of the work, it must do so in the same manner as all other trade contractors or subcontractors competing for such work. The school district has the final determination as to whether the construction manager-at-risk's bid or proposal provides the best value for the school district.

It is important to note that Section 44.038(j) specifically requires the construction manager-at-risk and the school district or its designated representative to receive and open trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process. Thus, there is no requirement for a "public opening" of bids or proposals, nor is there a requirement that the names of the bidders or offerors be publicly disclosed. The only requirement imposed upon the construction manager-at-risk and the school district is that all bids or proposals shall be made public within seven days after the date of final selection.

If during the course of receiving, reviewing and evaluating the bids or proposals, the construction manager-at-risk recommends to the school district a bid or proposal from a trade contractor or subcontractor, but the school district requires another bid or proposal to be accepted, then the school district is obligated to compensate the construction manager-at-risk by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the construction manager-at-risk may incur because of the school district's requirement that another bid or proposal (other than the one recommended) be accepted.

The construction manager-at-risk may not perform the inspection and testing services for the project. The school district is required to provide or contract for, independently of the construction manager-at-risk, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility. These inspection and testing services are to be obtained by the school district in accordance with the two-step process for obtaining architectural or engineering services as set forth in Section 2254.004 of the Texas Government Code.

E. DESIGN-BUILD CONTRACTS

The traditional method for contracting for the construction of public works in Texas is to have separate contracts for the design

and construction of the public work. Under the design contract, detailed design and construction drawings and specifications are prepared by the design professional and then these documents are used as the basis for using competitive bidding to award the separate construction contract to a single prime contractor or multiple prime contractors. Under the design-build method of contracting, the public owner awards a single contract to the design-builder to design and construct the public work. Thus, the design-builder undertakes responsibility for both the design and construction of the project.

Until recently, public owners in Texas were not permitted to utilize the design-build approach for construction of public works. In the last decade, the Texas Legislature has granted some limited authority to various governmental entities to deviate from the traditional method of awarding separate contracts for the design and construction of a public project. In 1995, with the passage of S.B. 1, the Texas Legislature granted public school districts broad authority to use the design-build method of contracting for construction of school projects valued at $25,000 or more. Unfortunately, little guidance was given to school districts on what procedures to use to implement the design-build method of contracting. The 1997 Texas Legislature, with the passage of S.B. 583, established detailed procedures for school districts to follow in awarding design-build contracts for construction of school projects.

Section 44.036 of the Texas Education Code sets forth the requirements that must be satisfied by school districts when awarding design-build contracts for facilities. A "design-build contract" is defined in Section 44.036 to mean a single contract with a design-build firm (a partnership, corporation, or other legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas) for the design and construction of a facility (real property, including buildings and associated structures and improved or unimproved land). School districts may use the design-build method of contracting for the construction, rehabilitation, alteration, or repair of a facility. In using the design-build contract method, the contracting school district and the design-build firm must follow the procedures set forth in Subsections (c) - (j).

The school district may, but is not required to, designate an engineer or architect to act as its representative. If the school district does not have an engineer or architect as a full-time employee, then any engineer or architect selected by the school district to act as its designated representative must be selected on the basis of demonstrated competence and qualifications in accordance with the provisions of the Professional Services Procurement Act set forth in Chapter 2254 of the Texas Government Code. (See Appendix 5.)

After it has been determined by the school district that the design-build contract will provide the best value for a school project, the school district must utilize a process consisting of two phases for the selection of a design-build firm. Initially, the school district must prepare a Request For Qualifications ("RFQ") that includes general information on the project site, project scope, budget, special systems, selection criteria, and any other information that would assist potential design-build firms in submitting proposals for the project. The RFQ must be publicly advertised. Section 44.031(g) requires notice of the time by when and place where the responses to a RFQ will be received to be published in the county in which the school district's central administrative office is located, once a week for at least two weeks before the deadline for receiving responses to the RFQ.

The two-phase process for evaluating and selecting a design-build firm is as follows:

1. Phase One: The school district is required to solicit and evaluate information from each of the offerors regarding the following:

- the offeror's experience;

- the offeror's technical competence;
- the offeror's capability to perform;
- the past performance of the offeror's team and members of the team; and
- other appropriate factors submitted by the team or firm in response to the RFQ.

Each offeror must certify to the school district that each engineer or architect that is a member of its team was selected based on demonstrated competence and qualifications. The school district is not permitted to solicit cost-related or price-related information for evaluation purposes in the initial responses to the RFQ.

After the school district has evaluated the initial information submitted in response to the RFQ, the school district shall qualify a maximum of five potential offerors to submit additional information regarding technical proposals, implementation, and costing methodologies in response to a formal Request For Proposals ("RFP") based upon a design criteria package prepared by the school district. The "design criteria package" is a set of documents that provides sufficient information to permit a design-build firm to prepare a response to a school district's RFP and must specify the criteria the school district considers necessary to describe the project and may include, as appropriate, the following information:

- the legal description of the site;
- survey information concerning the site;
- interior space requirements;
- special material requirements;
- material quality standards;
- conceptual criteria for the project;
- special equipment requirements;
- cost or budget estimates;
- time schedules;
- quality assurance and quality control requirements;
- site development requirements;
- applicable codes and ordinances;
- provisions for utilities;
- parking requirements; and
- any other applicable requirements.

2. Phase Two: After the school district has issued an RFP to the qualified potential offerors identified in Phase One, the school district is required to evaluate the proposals submitted by such offerors on the basis of demonstrated competence and qualifications, taking into consideration the following factors:

- the safety and long-term durability of the project;
- the feasibility of implementing the project as proposed;
- the ability of the offeror to meet schedules;

- the costing methodology of the offeror; or
- any other appropriate factors set forth in the RFP.

A school district may not require offerors to submit detailed engineering or architectural designs as a part of their proposal. The school district is required to select the design-build firm that submits the proposal offering the best value for the school district.

After the school district has selected the successful design-build firm pursuant to the two phase process outlined above, then the engineers or architects of that design-build firm will complete the design for the school project, submitting all of the design elements to the school district's engineer or architect (if one has been designated) for review and determination of scope compliance before or concurrent with construction. S.B. 583 is very clear that the design-build firm must utilize an engineer and/or an architect, to the extent applicable or necessary, to ensure compliance with the engineering design requirements and all other applicable requirements of the statutes governing the practice of engineering (Article 3271a, V.T.C.S.) and architecture (Article 249a, V.T.C.S.) in Texas.

The school district may not allow the design-build firm to perform inspection and testing services in connection with the construction being performed under the design-build contract. Instead, the school district must provide or contract for, independently of the design-build firm, the inspection services, the testing of construction materials engineering, and the verification of testing services necessary for acceptance of the facility by the school district. These inspection and testing services are required to be obtained in accordance with the provisions of the Professional Services Procurement Act, set forth in Section 2254.004 of the Texas Government Code.

The design-build firm will be required to furnish payment and performance bonds for the project, consistent with the requirements of Chapter 2253 of the Texas Government Code. However, Section 44.036(j) of the Education Code clearly states that a payment or performance bond is not required for, and may not provide coverage for, the portion of a design-build contract that includes design services only. This provision does not affect the school district's ability to seek recovery under the contract from the design-build firm for errors, omissions, or defects in the design services.

Finally, at the conclusion of construction of the project, the design-build firm is required to supply a signed and sealed set of construction documents for the project to the school district. This set of construction documents will serve as the "record set of construction documents" for the school district, setting forth the final design of the project.

F. JOB ORDER CONTRACTS FOR FACILITIES REPAIR

Section 2 of S.B. 583 adds a new Section 44.041 to the Education Code that adds a contracting method that was not introduced by S.B. 1. This is the concept of a "job order" contract. Contracts that qualify for award under this procurement method are those: (1) for the minor repair, rehabilitation or alteration of a facility; (2) the work called for by the contract must be of a recurring nature, but delivery times and quantities are indefinite; and (3) the orders are awarded substantially on the basis of predescribed and prepriced tasks (e.g., unit prices). Examples of the type of work that would qualify for job order procurement would be ceiling tile replacement, door hanging, side walk construction and repainting.

New Section 44.041(b) requires school districts to advertise for, receive and publicly open competitive sealed proposals for job

order contracts based on time and material rates for the various types of work. The rates agreed to under a job order contract must be in effect for not less than six months nor longer than two years.

The RFP must be advertised in the same manner as competitive sealed proposals for construction services. Under the RFP, the school district may require offerors to submit information beyond just rates, including experience, past performance, proposed personnel and methodology.

This new law authorizes the school district to award job order contracts to one or more of the offerors. The school district is not required to award a contract to whomever submits the lowest rates. Instead, the school district may award on the basis of a combination of price and other factors including:

- experience,
- past performance,
- proposed personnel,
- methodology,
- safety record, and
- other appropriate factors.

Under Section 44.035(b), which is applicable to competitive sealed proposals generally, the school district may discuss proposals with offerors after proposals have been opened to allow for clarification and changes. In doing so, the school district must take precautions to ensure that information from competing proposals is not disclosed to other offerors.

Under a job order contract, specific work projects are authorized by the execution of an order by the school district and the contractor. Section 44.041(e) states the order may be either a fixed price, lump sum order or a unit price order based on estimated quantities. If the amount or estimated amount of the job order is in excess of $25,000, then the contractor must post a payment bond on the job order. If the job order is $100,000 or more, a performance bond is also required. Note, however, that the bonds are provided on each specific job order and not on the overall job order contract. This may be helpful to smaller contractors with limited bonding capacities. Given the nature of job order work, it is possible that many job orders may not be of a size that would require performance bonds.

III. CONSTRUCTION CONTRACTING FOR INSTITUTIONS OF HIGHER EDUCATION

A. COMPETITIVE BIDDING

In sharp contrast to the new provisions applicable to competitive bidding for school district construction contracts, S.B. 583 basically requires that construction contracts be awarded by the traditional competitive bidding process unless they are awarded pursuant to one of the five methods provided in Sections 51.779 - 51.784.

In fact, new Section 51.788(a) states that unless a contract is awarded under one of the five methods authorized, it must be awarded on the basis of competitive bids with the award going to the lowest responsible bidder. This is somewhat different than the school district's authority to award the contract offering the "best value" based on a combination of price and other factors. If the board of an institution of higher education is going to award to a bidder other than the lowest bidder, any bidder making a lower bid must be notified of that recommendation and given an opportunity before the award to present evidence to the board or its designated representative as to the responsibility of that bidder. In essence, the traditional method of competitive bidding is preserved for institutions of higher education by S.B. 583. Of course, an institution of higher education may opt to use one of the five authorized alternative contracting methods.

B. COMPETITIVE SEALED PROPOSAL FOR CONSTRUCTION SERVICES

Section 3 of S.B. 583 adds a new Section 51.783 to the Education Code that sets forth provisions governing an institution of higher education's selection of contractors through competitive sealed proposals. The provisions of Section 51.783 mirror exactly the competitive sealed proposal procedures established for school districts (See discussion in II. B.) with one minor difference. That difference relates to the public notice requirements of Section 51.783(e), which simply states that the institution's board shall publish notice of the RFP in a manner prescribed by the board.

C. CONSTRUCTION MANAGER-AGENT CONTRACTS

S.B. 583 added Section 51.781 to the Texas Education Code, expressly authorizing institutions of higher education to use the construction manager-agent contract method for construction, rehabilitation, alteration, or repair of a facility. The procedures applicable to construction manager-agent contracts for institutions of higher education are the same as those set forth in Section 43.037 applicable to school districts. The only exception is that the public advertisement requirements applicable to school districts are not applicable to institutions of higher education. S.B. 583 does not specify any public notice requirements with respect to public advertisement of an RFQ or RFP for construction manager-agent services.

D. CONSTRUCTION MANAGER-AT-RISK CONTRACTS

S.B. 583 added Section 51.782 to the Texas Education Code, expressly authorizing institutions of higher education to use the construction manager-at-risk contract method for construction, rehabilitation, alteration, or repair of a facility. The procedural requirements for institutions of higher education, when contracting for construction manager-at-risk services, are identical to those requirements imposed upon school districts in Section 43.038. The only exception to this requirement is the public

advertising requirements imposed by Section 44.031(g) upon school districts. S.B. 583 does not contain any specific requirements concerning public advertising in connection with the solicitation of construction manager-at-risk services by an institution of higher education other than the RFP shall be published in a manner prescribed by the board of that institution.

E. DESIGN-BUILD CONTRACTS

Prior to the passage of S.B. 583, institutions of higher education in Texas (See Section 61.003 in Appendix 3 for the definition of "institutions of higher education") were required to use competitive bidding for the award of all construction contracts. The 1997 Texas Legislature dramatically changed the way institutions of higher education contract for construction services by eliminating the requirement for competitive bidding by repealing Section 51.907 of the Education Code. (See Appendix 4 for the text of repealed Section 51.907) S.B. 583 grants institutions of higher education essentially the same flexibility in contracting for construction services that is now given to school districts in Texas. One of the contracting methods authorized by the new Subchapter S to Chapter 51 of the Education Code is the design-build contract.

Section 51.780 was added to the Education Code by S.B. 583. This provision authorizes institutions of higher education to utilize design-build contracts for facilities in exactly the same manner as school districts, as set forth in Section 44.036 of the Education Code. (See discussion in II. E.). The only procedural difference between school districts and institutions of higher education is that the public advertisement requirements applicable to school districts are not imposed upon institutions of higher education. Section 51.780(e) allows the board of an institution of higher education or its representative to publish the request for qualifications in a manner prescribed by the board.

F. JOB ORDER CONTRACTS FOR FACILITIES REPAIR

Section 51.784 of the Education Code, added by Section 3 of S.B. 583, authorizes institutions of higher education to award job order contracts. The provisions for this contracting method are identical to job order contracting by school districts. (See discussion in II. F.)

CONTRACTING METHOD SUMMARY SHEETS

A. School District's Construction Contracting Requirements

1. Contractor Competitive Bidding

2. Contractor Competitive Sealed Proposals

3. Construction Manager-Agent

4. Construction Manager-At-Risk

5. Design-Build

6. Job Order Contracts For Facilities Repair

B. Institutions of Higher Education's Construction Contracting Requirements

1. Contractor Competitive Bidding

2. Contractor Competitive Sealed Proposals

3. Construction Manager-Agent

4. Construction Manager-At-Risk

5. Design-Build

6. Job Order Contracts For Facilities Repair

SCHOOL DISTRICT'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONTRACTOR COMPETITIVE BIDDING

1. **Advertising/Public Notice Requirements** - Once per week for two weeks prior to bid or proposal submission deadline; in county where District's central administrative office located.

2. **Solicitation/RFP Information Requirements** - District to utilize A/E for design and preparation of construction documents for the project.

3. **Owner A/E Services Required** - A/E required to prepare the design and construction documents for the project.

4. **Contract Award Criteria** - At the bid amount to the bidder offering the best value to the District according to the selection criteria established by the District.

5. **Contract Pricing** - Lump sum fixed-price.

6. **Inspection And Testing** - District to independently obtain inspection and testing services using two- step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract in excess of $25,000; performance bond (in addition to payment bond) for contract in excess of $100,000.

8. **Subcontracting Requirements** - None.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - Public bid opening and bids read aloud.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Nothing specified.

SCHOOL DISTRICT'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONTRACTOR COMPETITIVE SEALED PROPOSALS

1. **Advertising/Public Notice Requirements** - Once per week for two weeks prior to bid or proposal submission deadline; in county where District's central administrative office located.

2. **Solicitation/RFCSP Information Requirements** - RFCSP to include construction documents prepared by independent A/E, selection criteria, estimated budget, project scope, schedule, and other information necessary for contractors to respond to RFCSP.

3. **Owner A/E Services Required** - A/E required to prepare the construction documents for the project.

4. **Contract Award Criteria** - District to evaluate and rank each proposal based upon published selection criteria which may include pricing, experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors demonstrating capabilities of offeror.

5. **Contract Pricing** - No limitations.

6. **Inspection And Testing** - District to independently obtain inspection and testing services using two- step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract in excess of $25,000; performance bond (in addition to payment bond) for contract in excess of $100,000.

8. **Subcontracting Requirements** - None required.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - Proposals publicly opened and names of offerors and monetary proposals, if any, read aloud. Information from competing proposals may not be disclosed to other offerors.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Prequalification of offerors permitted; prequalification decision not a conclusive determination regarding ultimate rejection or acceptance of subsequently submitted proposal.

SCHOOL DISTRICT'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONSTRUCTION MANAGER - AGENT

1. **Advertising/Public Notice Requirements** - Once per week for two weeks prior to bid or proposal submission deadline; in county where District's central administrative office located.

2. **Solicitation/RFP Information Requirements** - None specified.

3. **Owner A/E Services Required** - A/E required to prepare the design and construction documents for the project.

4. **Contract Award Criteria** - Selection based on demonstrated competence and qualifications utilizing two-step procurement process for selection of A/E services.

5. **Contract Pricing** - None specified other than fair and reasonable price; pricing to perform construction manager services, including general conditions, normally will be cost reimbursement with fee.

6. **Inspection And Testing** - District or CM/Agent may contract for independent inspection and testing services using two-step procurement process for A/E services.

7. **Bonding Requirements** - None required.

8. **Subcontracting Requirements** - None.

9. **Contractor Self-Performance Limitations** - CM/Agent may only self-perform general conditions.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - None specified; however District required to take adequate precautions to ensure proposal information not disclosed to other offerors.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Nothing specified.

SCHOOL DISTRICT'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONSTRUCTION MANAGER-AT-RISK

1. **Advertising/Public Notice Requirements** - Once per week for two weeks prior to bid or proposal submission deadline; in county where District's central administrative office located.

2. **Solicitation/RFP Information Requirements** - RFQ to include info on site, project scope, schedule, selection criteria, estimated budget, and other info useful in selection of CM-At-Risk.

3. **Owner A/E Services Required** - A/E required to prepare the design and construction documents for the project.

4. **Contract Award Criteria** - Selection criteria may include experience, past performance, safety record, proposed personnel and methodology, and other factors demonstrating capabilities of CM. Selection to be based on published selection criteria and ranking evaluation.

5. **Contract Pricing** - Fee plus price for performance of general conditions.

6. **Inspection And Testing** - District to independently obtain inspection and testing services using two- step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract in excess of $25,000; performance bond (in addition to payment bond) for contract in excess of $100,000.

8. **Subcontracting Requirements** - CM-At-Risk must publicly advertise and solicit competitive bids or competitive sealed proposals for all major elements of work other than the general conditions.

9. **Contractor Self-Performance Limitations** - CM-At-Risk may self perform any of the major elements of work; but must first submit a bid or proposal in the same manner as other trade contractors or subcontractors and the District must determine that the CM-At-Risk's bid or proposal provides the best value.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - CM-At-Risk proposals to be publicly opened and names of offerors and monetary proposals, if any, read aloud. All trade contractor or subcontractor bids or proposals made public within seven days after final selection.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Prequalification of offerors permitted; prequalification decision not a conclusive determination regarding ultimate rejection or acceptance of subsequently submitted proposal.

SCHOOL DISTRICT'S

CONSTRUCTION CONTRACTING REQUIREMENTS

DESIGN-BUILD

1. **Advertising/Public Notice Requirements** - Once per week for two weeks prior to bid or proposal submission deadline; in county where District's central administrative office located.

2. **Solicitation/RFP Information Requirements** - Phase I - RFQ to include info on project site, project scope, budget, special systems, selection criteria. Phase II - RFP to include design criteria package containing legal description, survey, interior space requirements, special material requirements, budget and/or time requirements, etc.

3. **Owner A/E Services Required** - District may designate engineer or architect to act as representative; preparation of design criteria package may require A/E services; District's A/E must review all design elements for scope compliance.

4. **Contract Award Criteria** - Phase I - qualification of maximum of five potential offerors based upon past experience, technical competence, capability to perform, past performance, and other appropriate factors. No cost related or pricing information permitted. Phase II - selection of firm proposal offering best value based upon demonstrated competence and qualifications, safety and long-term durability of project, feasibility of proposed project, ability to meet schedules, costing methodology, and other appropriate factors.

5. **Contract Pricing** - None specified. Normally lump sum fixed-price or cost reimbursement plus fee with guaranteed maximum price.

6. **Inspection And Testing** - District to independently obtain inspection and testing services using two- step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract greater than $25,000; performance bond (in addition to payment bond) for contract greater than $100,000. Design services excluded from coverage of payment and performance bonds.

8. **Subcontracting Requirements** - A/E team member of design-build firm must be selected based on demonstrated competence and qualifications; no other limitations.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - None specified; however District required to take adequate

precautions to ensure proposal information not disclosed to other offerors.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - None for participation in Phase I process; maximum of five offerors after completion of Phase I.

SCHOOL DISTRICT'S

CONSTRUCTION CONTRACTING REQUIREMENTS

JOB ORDER CONTRACT FOR FACILITIES REPAIR

1. **Advertising/Public Notice Requirements** - Once per week for two weeks prior to bid or proposal submission deadline; in county where District's central administrative office located.

2. **Solicitation/RFP Information Requirements** - Description of the types and classifications of the work.

3. **Owner A/E Services Required** - None specified.

4. **Contract Award Criteria** - District may award contracts to one or more contractors based upon pricing, experiences, past performance, proposed personnel and methodology, safety record, and other appropriate factors.

5. **Contract Pricing** - Fixed price or unit price time and material rates for various types and classifications of work.

6. **Inspection And Testing** - Nothing specified.

7. **Bonding Requirements** - Bonds are provided on individual job orders, not on overall job order contract. Payment bond for job order in excess of $25,000; performance bond (in addition to payment bond) for job order in excess of $100,000.

8. **Subcontracting Requirements** - None required.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - Proposals publicly opened; however, information from competing proposals not to be disclosed to other offerors.

11. **Term Of Contract Limitations** - A minimum of six months, but no greater than two years.

12. **Prequalification Of Bidders/Offerors** - Nothing specified.

INSTITUTIONS OF HIGHER EDUCATION'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONTRACTOR COMPETITIVE BIDDING

1. **Advertising/Public Notice Requirements** - Publish in a manner prescribed by the Board.

2. **Solicitation/RFP Information Requirements** - Board to utilize A/E for design and preparation of construction documents for the project.

3. **Owner A/E Services Required** - A/E required to prepare the design and construction documents for the project.

4. **Contract Award Criteria** - Contract award to lowest responsible bidder as determined by the Board.

5. **Contract Pricing** - Lump sum fixed-price.

6. **Inspection And Testing** - Board to independently obtain inspection and testing services using two-step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract in excess of $25,000; performance bond (in addition to payment bond) for contract in excess of $100,000.

8. **Subcontracting Requirements** - None.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - Public bid opening and bids read aloud.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Nothing specified.

INSTITUTIONS OF HIGHER EDUCATION'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONTRACTOR COMPETITIVE SEALED PROPOSALS

1. **Advertising/Public Notice Requirements** - Publish in a manner prescribed by the Board.

2. **Solicitation/RFCSP Information Requirements** - RFCSP to include construction documents prepared by independent A/E, selection criteria, estimated budget, project scope, schedule, and other information necessary for contractors to respond to RFCSP.

3. **Owner A/E Services Required** - A/E required to prepare the construction documents for the project.

4. **Contract Award Criteria** - At the bid amount to the bidder offering the best value to the Board according to the selection criteria established by the Board.

5. **Contract Pricing** - No limitations.

6. **Inspection And Testing** - Board to independently obtain inspection and testing services using two-step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract in excess of $25,000; performance bond (in addition to payment bond) for contract in excess of $100,000.

8. **Subcontracting Requirements** - None required.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - Proposals publicly opened and names of offerors and monetary proposals, if any, read aloud. Information from competing proposals may not be disclosed to other offerors.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Prequalification of offerors permitted; prequalification decision not a conclusive determination regarding ultimate rejection or acceptance of subsequently submitted proposal.

INSTITUTIONS OF HIGHER EDUCATION'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONSTRUCTION MANAGER-AGENT

1. **Advertising/Public Notice Requirements** - Publish in a manner prescribed by the Board.

2. **Solicitation/RFP Information Requirements** - None specified.

3. **Owner A/E Services Required** - A/E required to prepare the design and construction documents for the project.

4. **Contract Award Criteria** - Selection based on demonstrated competence and qualifications utilizing two-step procurement process for selection of A/E services.

5. **Contract Pricing** - None specified other than fair and reasonable price; pricing to perform construction manager services, including general conditions, normally will be cost reimbursement with fee.

6. **Inspection And Testing** - Board or CM/Agent may contract for independent inspection and testing services using two-step procurement process for A/E services.

7. **Bonding Requirements** - None required.

8. **Subcontracting Requirements** - None.

9. **Contractor Self-Performance Limitations** - CM/Agent may only self-perform general conditions.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - None specified; however Board required to take adequate precautions to ensure proposal information not disclosed to other offerors.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Nothing specified.

INSTITUTIONS OF HIGHER EDUCATION'S

CONSTRUCTION CONTRACTING REQUIREMENTS

CONSTRUCTION MANAGER-AT-RISK

1. **Advertising/Public Notice Requirements** - Publish in a manner prescribed by the Board.

2. **Solicitation/RFP Information Requirements** - RFQ to include info on site, project scope, schedule, selection criteria, estimated budget, and other info useful in selection of CM-At-Risk.

3. **Owner A/E Services Required** - A/E required to prepare the design and construction documents for the project.

4. **Contract Award Criteria** - Selection criteria may include experience, past performance, safety record, proposed personnel and methodology, and other factors demonstrating capabilities of CM. Selection to be based on published selection criteria and ranking evaluation.

5. **Contract Pricing** - Fee plus price for performance of general conditions.

6. **Inspection And Testing** - Board to independently obtain inspection and testing services using two-step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract in excess of $25,000; performance bond (in addition to payment bond) for contract in excess of $100,000.

8. **Subcontracting Requirements** - CM-At-Risk must publicly advertise and solicit competitive bids or competitive sealed proposals for all major elements of work other than the general conditions.

9. **Contractor Self-Performance Limitations** - CM-At-Risk may self perform any of the major elements of work; but must first submit a bid or proposal in the same manner as other trade contractors or subcontractors and the Board must determine that the CM-At-Risk's bid or proposal provides the best value.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - CM-At-Risk proposals to be publicly opened and names of offerors and monetary proposals, if any, read aloud. All trade contractor or subcontractor bids or proposals made public within seven days after final selection.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - Prequalification of offerors permitted; prequalification decision not a conclusive determination regarding ultimate rejection or acceptance of subsequently submitted proposal.

INSTITUTIONS OF HIGHER EDUCATION'S

CONSTRUCTION CONTRACTING REQUIREMENTS

DESIGN-BUILD

1. **Advertising/Public Notice Requirements** - Publish in a manner prescribed by the Board.

2. **Solicitation/RFP Information Requirements** - Phase I - RFQ to include info on project site, project scope, budget, special systems, selection criteria. Phase II - RFP to include design criteria package containing legal description, survey, interior space requirements, special material requirements, budget and/or time requirements, etc.

3. **Owner A/E Services Required** - Board may designate engineer or architect to act as representative; preparation of design

criteria package may require A/E services; Board's A/E must review all design elements for scope compliance.

4. **Contract Award Criteria** - Phase I - qualification of maximum of five potential offerors based upon past experience, technical competence, capability to perform, past performance, and other appropriate factors. No cost related or pricing information permitted. Phase II - selection of firm proposal offering best value based upon demonstrated competence and qualifications, safety and long-term durability of project, feasibility of proposed project, ability to meet schedules, costing methodology, and other appropriate factors.

5. **Contract Pricing** - None specified. Normally lump sum fixed-price or cost reimbursement plus fee with guaranteed maximum price.

6. **Inspection And Testing** - Board to independently obtain inspection and testing services using two-step procurement process for selection of A/E services.

7. **Bonding Requirements** - Payment bond for contract greater than $25,000; performance bond (in addition to payment bond) for contract greater than $100,000. Design services excluded from coverage of payment and performance bonds.

8. **Subcontracting Requirements** - A/E team member of design-build firm must be selected based on demonstrated competence and qualifications; no other limitations.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - None specified; however Board required to take adequate precautions to ensure proposal information not disclosed to other offerors.

11. **Term Of Contract Limitations** - None specified.

12. **Prequalification Of Bidders/Offerors** - None for participation in Phase I process; maximum of five offerors after completion of Phase I.

INSTITUTIONS OF HIGHER EDUCATION'S

CONSTRUCTION CONTRACTING REQUIREMENTS

JOB ORDER CONTRACT FOR FACILITIES REPAIR

1. **Advertising/Public Notice Requirements** - Publish in a manner prescribed by the Board.

2. **Solicitation/RFP Information Requirements** - Description of the types and classifications of the work.

3. **Owner A/E Services Required** - None specified.

4. **Contract Award Criteria** -Board may award contracts to one or more contractors based upon pricing, experiences, past performance, proposed personnel and methodology, safety record, and other appropriate factors.

5. **Contract Pricing** - Fixed price or unit price time and material rates for various types and classifications of work.

6. **Inspection And Testing** - Nothing specified.

7. **Bonding Requirements** - Bonds are provided on individual job orders, not on overall job order contract. Payment bond for job order in excess of $25,000; performance bond (in addition to payment bond) for job order in excess of $100,000.

8. **Subcontracting Requirements** - None required.

9. **Contractor Self-Performance Limitations** - None.

10. **Bid/Proposal Disclosure Requirements Or Restrictions** - Proposals publicly opened; however, information from competing proposals not to be disclosed to other offerors.

11. **Term Of Contract Limitations** - A minimum of six months, but no greater than two years.

12. **Prequalification Of Bidders/Offerors** - Nothing specified.

APPENDIX

Appendix 1 - Chapter 44. Fiscal Management, Subchapter B. Purchases; Contracts

Appendix 2 - Chapter 51. Provisions Generally Applicable to Higher Education

Appendix 3 -Section 61.003 of Education Code (Definitions)

Appendix 4 -Section 51.907 of Education Code (deleted by S.B. 583)

Appendix 5 - Professional Services Procurement Act, Chapter 2254, Government Code

Appendix 6 - Art. 249a Regulation of Practice of Architecture

Appendix 7 - Art. 3271a. Texas Engineering Practice Act

Appendix 8 - Section 2253.021 Texas Government Code

Appendix 9 - Subchapter B. Chapter 271 Local Government Code

APPENDIX 1

Texas Education Code

Chapter 44. FISCAL MANAGEMENT

Subchapter B. Purchases; Contracts

Sec. 44.031. **PURCHASING CONTRACTS**

(a) Except as provided by this subchapter, all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at $25,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value to the district:

(1) competitive bidding;

(2) competitive sealed proposals;

(3) a request for proposals;

(4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;

(5) an interlocal contract;

(6) a design/build contract;

(7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager; or

(8) a job order contract for the minor repair, rehabilitation, or alteration of a facility.

(b) Except as provided by this subchapter, in determining to whom to award a contract, the district may consider:

(1) the purchase price;

(2) the reputation of the vendor and of the vendor's goods or services;

(3) the quality of the vendor's goods or services;

(4) the extent to which the goods or services meet the district's needs;

(5) the vendor's past relationship with the district;

(6) the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses;

(7) the total long-term cost to the district to acquire the vendor's goods or services; and

(8) any other relevant factor that a private business entity would consider in selecting a vendor.

(c) The state auditor may audit purchases of goods or services by the district.

(d) The district may adopt rules and procedures for the acquisition of goods or services.

(e) To the extent of any conflict, this subchapter prevails over any other law relating to the purchasing of goods and services except a law relating to contracting with historically underutilized businesses.

(f) This section does not apply to fees received for professional services rendered, including architect's fees, attorney's fees, and fees for fiscal agents.

(g) Notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received shall be published in the county in which the district's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications; except that on contracts involving less than $25,000, the advertising may be limited to two successive issues of any newspaper published in the county in which the district's central administrative office is located, and if there is not a newspaper in that county, the advertising shall be published in a newspaper in the county nearest the county seat of the county in which the district's central administrative office is located.

(h) If school equipment is destroyed or severely damaged, and the board of trustees determines that the delay posed by the competitive bidding process would prevent or substantially impair the conduct of classes or other essential school activities, then contracts for the replacement or repair of the equipment may be made without competitive bidding as otherwise required by this section.

(i) The board of trustees of a school district may acquire computers and computer-related equipment, including computer software, through the General Services Commission under contracts entered into in accordance with Chapter 2157, Government Code. Before issuing an invitation for bids, the commission shall consult with the agency concerning the computer and computer-related equipment needs of school districts. To the extent possible the resulting contract shall provide for such needs.

(j) Without complying with Subsection (a), the board of trustees of a school district may purchase an item that is available from only one source, including:

(1) an item for which competition is precluded because of the existence of a patent, copyright, secret process, or monopoly;

(2) a film, manuscript, or book;

(3) a captive replacement part or component for equipment.

(k) The exceptions provided by Subsection (j) do not apply to mainframe data-processing equipment and peripheral attachments with a single-item purchase price in excess of $15,000.

(l) Each contract proposed to be made by the board of trustees of a school district for the purchase or lease of one or more school buses, including a lease with an option to purchase, must

be submitted to competitive bidding when the contract is valued at $20,000 or more.

Sec. 44.0315. **DEFINITIONS**

In this subchapter:

(1) "Architect" means an individual registered as an architect under Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes).

(2) "Contractor" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the facility at the contracted price.

(3) "Engineer" means an individual registered as a professional engineer under The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes).

(4) "Facility" means real property, including buildings and associated structures and improved or unimproved land.

(5) "Fee" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means the payment a construction manager receives for its overhead and profit in performing its services.

(6) "General conditions" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials.

Sec. 44.032. **ENFORCEMENT OF PURCHASE PROCEDURES: CRIMINAL PENALTIES; REMOVAL; INELIGIBILITY**

(a) In this section:

(1) "Component purchases" means purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

(2) "Separate purchases" means purchases, made separately, of items that in normal purchasing practices would be purchased in one purchase.

(3) "Sequential purchases" means purchases, made over a period, of items that in normal purchasing practices would be purchased in one purchase.

(b) An officer, employee, or agent of a school district commits an offense if the person with criminal negligence makes or authorizes separate, sequential, or component purchases to avoid the requirements of Section 44.031(a) or (b). An offense under this subsection is a Class B misdemeanor and is an offense involving moral turpitude.

(c) An officer, employee, or agent of a school district commits an offense if the person with criminal negligence violates Section 44.031(a) or (b) other than by conduct described by Subsection (b). An offense under this subsection is a Class B misdemeanor and is an offense involving moral turpitude.

(d) An officer or employee of a school district commits an offense if the officer or employee knowingly violates Section 44.031, other than by conduct described by Subsection (b) or (c). An offense under this subsection is a Class C misdemeanor.

(e) The final conviction of a person other than a trustee of a school district for an offense under Subsection (b) or (c) results in the immediate removal from office or employment of that person. A trustee who is convicted of an offense under this section is considered to have committed official misconduct for purposes of Chapter 87, Local Government Code, and is subject to removal as provided by that chapter and Section 24, Article V, Texas Constitution. For four years after the date of the final conviction, the removed person is ineligible to be a candidate for or to be appointed or elected to a public office in this state, is ineligible to be employed by or act as an agent for the state or a political subdivision of the state, and is ineligible to receive any compensation through a contract with the state or a political subdivision of the state. This subsection does not prohibit the payment of retirement benefits to the removed person or the payment of workers' compensation benefits to the removed person for an injury that occurred before the commission of the offense for which the person was removed. This subsection does not make a person ineligible for an office for which the federal or state constitution prescribes exclusive eligibility requirements.

(f) A court may enjoin performance of a contract made in violation of Section 44.031(a) or (b). A county attorney, a district attorney, a criminal district attorney, or a citizen of the county in which the school district is located may bring an action for an injunction. A citizen who prevails in an action brought under this subsection is entitled to reasonable attorney's fees as approved by the court.

Sec. 44.033. **PURCHASES OF PERSONAL PROPERTY VALUED BETWEEN $10,000 AND $25,000**

(a) A school district shall purchase personal property as provided by this section if the value of the items is at least $10,000 but less than $25,000, in the aggregate, for a 12-month period. In the alternative, the school district may purchase those items in accordance with Sections 44.031 (a) and (b).

(b) For each 12-month period, the district shall publish a notice in two successive issues of any newspaper of general circulation in the county in which the school is located. If there is no newspaper in the county in which the school is located, the advertising shall be published in a newspaper in the county nearest the county seat of the county in which the school is located, specifying the categories of personal property to be purchased under this section and soliciting the names, addresses, and telephone numbers of vendors that are interested in supplying any of the categories to the district. For each category, the district shall create a vendor list consisting of each vendor that responds to the published notice and any additional vendors the district elects to include.

(c) Before the district makes a purchase from a category of personal property, the district must obtain written or telephone price quotations from at least three vendors from the list for that category. If fewer than three vendors are on the list, the district shall contact each vendor on the list. Whenever possible, telephone quotes should be confirmed in writing by mail or facsimile. The bidding records must be retained with the school's competitive bidding records and are subject to audit. The purchase shall be made from the lowest responsible bidder.

(d) Purchases of produce and fuel shall be made in accordance with this section.

Sec. 44.034. **NOTIFICATION OF CRIMINAL HISTORY OF CONTRACTOR**

(a) A person or business entity that enters into a contract with a school district must give advance notice to the district if the person or an owner or operator of the business entity has been convicted of a felony. The notice must include a general description of the conduct resulting in the conviction of a felony.

(b) A school district may terminate a contract with a person or business entity if the district determines that the person or business entity failed to give notice as required by Subsection (a) or misrepresented the conduct resulting in the conviction. The district must compensate the person or business entity for services performed before the termination of the contract.

(c) This section does not apply to a publicly held corporation.

Sec. 44.035. **COMPETITIVE SEALED PROPOSALS FOR CONSTRUCTION SERVICES**

(a) Except as otherwise provided by this subchapter, a school district using competitive sealed proposals to select a contractor for construction services, to select a construction manager, or to award a job order contract for construction services shall base its selection or award on a combination of price and other factors that the district determines provides the best value to the district.

(b) A school district using competitive sealed proposals may discuss proposals with offerors after proposals have been opened to allow for clarification and changes. The district shall take adequate precautions to ensure that information from competing proposals is not disclosed to other offerors.

Sec. 44.036. **DESIGN-BUILD CONTRACTS FOR FACILITIES**

(a) In this section:

(1) "Design-build contract" means a single contract with a design-build firm for the design and construction of a facility.

(2) "Design-build firm" means a partnership, corporation, or other legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas.

(3) "Design criteria package" means a set of documents that provides sufficient information to permit a design-build firm to prepare a response to a school district's request for proposals. The design criteria package must specify criteria the district considers necessary to describe the project and may include, as appropriate, the legal description of the site, survey information concerning the site, interior space requirements, special material requirements, material quality standards, conceptual criteria for the project, special equipment requirements, cost or budget estimates, time schedules, quality assurance and quality control requirements, site development requirements, applicable codes and ordinances, provisions for utilities, parking requirements, or any other requirement, as applicable.

(b) A school district may use the design-build method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a design-build firm, the contracting school district and the design-build firm shall follow the procedures provided by Subsections (c)-(j).

(c) The district may designate an engineer or architect to act as its representative. If the district's engineer or architect is not a full-time employee of the district, any engineer or architect designated shall be selected on the basis of demonstrated competence and qualifications in accordance with Subchapter A, Chapter 2254, Government Code.

(d) The district shall prepare a request for qualifications that includes general information on the project site, project scope, budget, special systems, selection criteria, and other information that may assist potential design-build firms in submitting proposals for the project. The district shall also prepare the design criteria package that includes more detailed information on the project. If the preparation of the design criteria package requires engineering or architectural services that constitute the practice of engineering within the meaning of The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or the practice of architecture within the meaning of Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), those services shall be provided in accordance with the applicable law.

(e) The district shall evaluate proposals and select a design-build firm in two phases:

(1) In phase one, the district shall evaluate each offeror's experience, technical competence, and capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted. Each offeror must certify to the district that each engineer or architect that is a member of its team was selected based on demonstrated competence and qualifications. The district shall qualify a maximum of five potential offerors to submit additional information regarding technical proposals, implementation, and costing methodologies in response to a formal request for proposals based on the design criteria package.

(2) In phase two, the district shall evaluate offerors on the basis of demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, costing methodology, or other factors as appropriate. The district may not require offerors to submit detailed engineering or architectural designs as part of the proposal. The district shall select the design-build firm that submits

the proposal offering the best value for the district.

(f) Following selection of a design-build firm under Subsection (e), that firm's engineers or architects shall complete the design, submitting all design elements for review and determination of scope compliance by the district's engineer or architect before or concurrently with construction.

(g) An engineer shall have responsibility for compliance with the engineering design requirements and all other applicable requirements of The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes). An architect shall have responsibility for compliance with the requirements of Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes).

(h) The district shall provide or contract for, independently of the design-build firm, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the district. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(i) The design-build firm shall supply a signed and sealed set of construction documents for the project to the district at the conclusion of construction.

(j) A payment or performance bond is not required for, and may not provide coverage for, the portion of a design-build contract under this section that includes design services only.

Sec. 44.037. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AGENT** (a) A school district may use the construction manager-agent method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a construction manager-agent, a district shall follow the procedures prescribed by this section.

(b) A construction manager-agent is a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the school district regarding construction, rehabilitation, alteration, or repair of the facility. A construction manager-agent represents the district in a fiduciary capacity, except that it may perform general conditions as provided by the contract.

(c) Before or concurrently with selecting a construction manager-agent, the district shall select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), as applicable. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

(d) A district shall select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner as provided for the selection of engineers or architects under Section 2254.004, Government Code.

(e) A district using the construction manager-agent method shall procure, in accordance with applicable law and in any manner authorized by this chapter, a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work.

(f) The district or the construction manager-agent shall procure in accordance with Section 2254.004, Government Code, all of the testing of construction materials engineering, the inspection services, and the verification testing services necessary for acceptance of the facility by the district.

Sec. 44.038. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK**

(a) A school district may use the construction manager-at-risk method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a construction manager-at-risk, a district shall follow the procedures prescribed by this section.

(b) A construction manager-at-risk is a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides

consultation to the school district regarding construction during and after the design of the facility.

(c) Before or concurrently with selecting a construction manager-at-risk, the district shall select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), as applicable. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

(d) The district shall provide or contract for, independently of the construction manager-at-risk, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the district. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(e) The district shall prepare a request for competitive sealed proposals that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, the time and place for receipt of proposals, and other information that may assist the district in its selection of a construction manager-at-risk. The district may request that proposals provide the construction manager's proposed fee and its price for fulfilling the general conditions. The district shall state the selection criteria in the request for proposals. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the construction manager.

(f) The district may provide for prequalifying offerors before proposals are submitted. Prequalification may not be a conclusive determination that an offeror offers the best value to the district, and a prequalified offeror may be rejected on the basis of subsequently discovered information. A failure to prequalify does not bar a subsequent determination that an offeror offers the best value to the district with respect to a given proposal.

(g) The district shall receive, publicly open, and read aloud the names of the offerors and the monetary proposals, if any, for each proposal. Within 45 days after the date of opening the proposals, the district shall evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals.

(h) The district shall select the offeror that offers the best value to the district based on the published selection criteria and on its ranking evaluation. If the district is unable to reach a contract agreement with the selected offeror, the district shall terminate further discussions and proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected.

(i) A construction manager-at-risk shall publicly advertise and solicit either competitive bids or competitive sealed proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. A construction manager-at-risk may seek to perform portions of the work itself if the construction manager-at-risk submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors and if the district determines that the construction manager-at-risk's bid or proposal provides the best value for the district.

(j) The construction manager-at-risk and the district or its representative shall receive and open all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process. All bids or proposals shall be made public within seven days after the date of final selection.

(k) If the construction manager-at-risk reviews, evaluates, and recommends to the district a bid or proposal from a trade contractor or subcontractor but the district requires another bid or proposal to be accepted, the district shall compensate the construction manager-at-risk by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the construction manager-at-risk may incur because of the district's requirement that another bid or proposal be accepted.

Sec. 44.039. **SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS**

(a) In selecting a contractor for construction, rehabilitation, alteration, or repair services for a facility through competitive sealed proposals, a school district shall follow the procedures prescribed by this section.

(b) The district shall select or designate an engineer or architect to prepare construction documents for the project. The selected or designated engineer or architect has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a,

Vernon's Texas Civil Statutes), as applicable. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

(c) The district shall provide or contract for, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the district. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(d) The district shall prepare a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other information that contractors may require to respond to the request. The district shall state the selection criteria in the request for proposals. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the contractor.

(e) The district may provide for prequalifying offerors before proposals are submitted. Prequalification may not be a conclusive determination that an offeror offers the best value to the district, and a prequalified offeror may be rejected on the basis of subsequently discovered information. A failure to prequalify does not bar a subsequent determination that an offeror offers the best value to the district with respect to a given proposal.

(f) The district shall receive, publicly open, and read aloud the names of the offerors and the monetary proposals, if any, stated in each proposal. Within 45 days after the date of opening the proposals, the district shall evaluate and rank each proposal submitted in relation to the published selection criteria.

(g) The district shall select the offeror that offers the best value to the district based on the published selection criteria and on its ranking evaluation. The district and its engineer or architect may discuss with the selected offeror options for cost reduction. If the district is unable to reach a contract agreement with the selected offeror, the district shall terminate further discussions and proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected.

(h) In determining best value for the district, the district is not restricted to considering price alone, but may consider any other factor stated in the selection criteria.

Sec. 44.040. **SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE BIDDING**

(a) Except to the extent prohibited by other law and to the extent consistent with this subchapter, a school district may use competitive bidding to select a contractor to perform construction, rehabilitation, alteration, or repair services for a facility.

(b) Sections 271.021, 271.022, 271.026, 271.027(a), and 271.0275-271.030, Local Government Code, apply to a competitive bidding process under this section.

(c) A school district shall award a competitively bid contract at the bid amount to the bidder offering the best value to the district according to the selection criteria that were established by the district. The selection criteria may include the factors listed in Section 44.031(b).

Sec. 44.041. **JOB ORDER CONTRACTS FOR FACILITIES REPAIR**

(a) A school district may award job order contracts for the minor repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of predescribed and prepriced tasks.

(b) The school district shall advertise for, receive, and publicly open competitive sealed proposals for job order contracts based on time and material rates for various types and classifications of work. The rates under a job order contract shall be in effect for at least six months and for not longer than two years.

(c) The district may require offerors to submit additional information besides rates, including experience, past performance, and proposed personnel and methodology.

(d) The district may award job order contracts to one or more contractors based on price proposals, experience, past performance, proposed personnel and methodology, safety record, and other appropriate factors.

(e) An order for a job or project under the job order contract must be signed by the district's representative and the contractor. The order may be a fixed price, lump-sum contract based on a statement of work negotiated between the district or its representative and the contractor, or the order may be a unit price order based on estimated quantities. The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.

APPENDIX 2

Texas Education Code

Chapter 51. PROVISIONS GENERALLY APPLICABLE TO HIGHER EDUCATION

Subchapter S. Construction And Repair of Permanent Improvements

Sec. 51.776. **DEFINITIONS**

In this subchapter:

(1) "Architect" means an individual registered as an architect under Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes).

(2) "Board" means the governing body of an institution.

(3) "Contractor" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the facility at the contracted price.

(4) "Engineer" means an individual registered as a professional engineer under The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes).

(5) "Facility" means real property, including buildings and associated structures and improved or unimproved land.

(6) "Fee" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means the payment a construction manager receives for its overhead and profit in performing its services.

(7) "General conditions" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials.

(8) "Institution" means an institution of higher education as defined by Section 61.003.

Sec. 51.777. **DELEGATION OF AUTHORITY**

A board may, as appropriate, delegate by rule its authority under this subchapter to its designated representative.

Sec. 51.778. **COMPETITIVE BIDDING ON CONTRACTS**

(a) Except as otherwise provided by this subchapter, all contracts for the construction or erection of permanent improvements at an institution are void unless made after advertising for bids for the contracts in a manner prescribed by the institution's board, receiving sealed competitive bids, and awarding of the contract to the lowest responsible bidder by the board.

(b) If a contract awarded under sealed competitive bidding is to be recommended for award to other than the lowest bidder, any bidder making a lower bid than the recommended bid shall be notified of the recommendation for award and shall be allowed an opportunity before the award to present evidence to the board or its designated representative as to the responsibility of that bidder.

Sec. 51.779. **COMPETITIVE SEALED PROPOSALS FOR CONSTRUCTION SERVICES**

(a) Except as otherwise provided by this subchapter, the board of an institution using competitive sealed proposals to select a contractor for construction services, to select a construction manager, or to award a job order contract for construction services shall base its selection or award on a combination of price and other factors that the board determines provides the best value to the institution.

(b) An institution using competitive sealed proposals may discuss proposals with offerors after proposals have been opened to allow for clarification and changes. The institution shall take adequate precautions to ensure that information from competing proposals is not disclosed to other offerors.

Sec. 51.780. **DESIGN-BUILD CONTRACTS FOR FACILITIES**

(a) In this section:

(1) "Design-build contract" means a single contract with a design-build firm for the design and construction of a facility.

(2) "Design-build firm" means a partnership, corporation, or other legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas.

(3) "Design criteria package" means a set of documents that provides sufficient information to permit a design-build firm to prepare a response to an institution's request for proposals. The design criteria package must specify criteria the institution considers necessary to describe the project and may include, as appropriate, the legal description of the site, survey information concerning the site, interior space requirements, special material requirements, material quality standards, conceptual criteria for the project, special equipment requirements, cost or budget estimates, time schedules, quality assurance and quality control requirements, site development requirements, applicable codes and ordinances, provisions for utilities, parking requirements, or any other requirement, as applicable.

(b) An institution may use the design-build method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a design-build firm, the contracting institution and the

design-build firm shall follow the procedures provided by Subsections (c)-(k).

(c) The board may designate an engineer or architect to act as its representative. If the board's engineer or architect is not a full-time employee of the institution, any engineer or architect designated shall be selected on the basis of demonstrated competence and qualifications in accordance with Subchapter A, Chapter 2254, Government Code.

(d) The institution shall prepare a request for qualifications that includes general information on the project site, project scope, budget, special systems, selection criteria, and other information that may assist potential design-build firms in submitting proposals for the project. The institution shall also prepare the design criteria package that includes more detailed information on the project. If the preparation of the design criteria package requires engineering or architectural services that constitute the practice of engineering within the meaning of The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or the practice of architecture within the meaning of Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), those services shall be provided in accordance with the applicable law.

(e) The board or its representative shall publish the request for qualifications in a manner prescribed by the board.

(f) The board or its representative shall evaluate proposals and select a design-build firm in two phases:

(1) In phase one, the board or its representative shall evaluate each offeror's experience, technical competence, and capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted. Each offeror must certify to the board that each engineer or architect that is a member of its team was selected based on demonstrated competence and qualifications. The board or its representative shall qualify a maximum of five potential offerors to submit additional information regarding technical proposals, implementation, and costing methodologies in response to a formal request for proposals based on the design criteria package.

(2) In phase two, the board or its representative shall evaluate offerors on the basis of demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, costing methodology, or other factors as appropriate. The institution may not require offerors to submit detailed engineering or architectural design as part of the proposal. The board shall select the design-build firm that submits the proposal offering the best value for the institution.

(g) Following selection of a design-build firm under Subsection (f), that firm's engineers or architects shall complete the design, submitting all design elements for review and determination of scope compliance by the institution's engineer or architect before or concurrently with construction.

(h) An engineer shall have responsibility for compliance with the engineering design requirements and all other applicable requirements of The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes). An architect shall have responsibility for compliance with the requirements of Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes).

(i) The institution shall provide or contract for, independently of the design-build firm, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the institution. The institution shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(j) The design-build firm shall supply a signed and sealed set of construction documents for the project to the institution at the conclusion of construction.

(k) A payment or performance bond is not required for, and may not provide coverage for, the portion of a design-build contract under this section that includes design services only.

Sec. 51.781. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AGENT** (a) An institution may use the construction manager-agent method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a construction manager-agent, a board shall follow the procedures prescribed by this section.

(b) A construction manager-agent is a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the institution regarding construction, rehabilitation, alteration, or repair of the facility. A construction manager-agent represents the institution in a fiduciary capacity, except that it may perform general conditions as provided by the contract.

(c) Before or concurrently with selecting a construction manager-agent, the board shall select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), as applicable. If the engineer or architect is not a full-time employee of the institution, the board shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

(d) A board shall select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner as provided for the selection of engineers or architects under Section 2254.004, Government Code.

(e) A board using the construction manager-agent method shall procure, in accordance with applicable law and in any manner authorized by this chapter, a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work.

(f) The board or the construction manager-agent shall procure in accordance with Section 2254.004, Government Code, all of the testing of construction materials engineering, the inspection services, and the verification testing services necessary for acceptance of the facility by the institution.

Sec. 51.782. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK**

(a) An institution may use the construction manager-at-risk method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a construction manager-at-risk, a board shall follow the procedures prescribed by this section.

(b) A construction manager-at-risk is a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides

consultation to the institution regarding construction during and after the design of the facility.

(c) Before or concurrently with selecting a construction manager-at-risk, the board shall select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), as applicable. If the engineer or architect is not a full-time employee of the institution, the board shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

(d) The board shall provide or contract for, independently of the construction manager-at-risk, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the institution. The board shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(e) The board shall prepare a request for competitive sealed proposals that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, the time and place for receipt of proposals, and other information that may assist the board in its selection of a construction manager-at-risk. The board may request that proposals provide the construction manager's proposed fee and its price for fulfilling the general conditions. The board shall state the selection criteria in the request for proposals. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the construction manager.

(f) The board shall publish the request for proposals in a manner prescribed by the board.

(g) The board may provide for prequalifying offerors before proposals are submitted. Prequalification may not be a conclusive determination that an offeror offers the best value to the institution, and a prequalified offeror may be rejected on the basis of subsequently discovered information. A failure to prequalify does not bar a subsequent determination that an offeror offers the best value to the institution with respect to a given proposal.

(h) The board shall receive, publicly open, and read aloud the names of the offerors and the monetary proposals, if any, for each proposal. Within 45 days after the date of opening the proposals, the board shall evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals.

(i) The board shall select the offeror that offers the best value to the institution based on the published selection criteria and on its ranking evaluation. If the board is unable to reach a contract agreement with the selected offeror, the board shall terminate further discussions and proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected.

(j) A construction manager-at-risk shall publicly advertise and solicit either competitive bids or competitive sealed proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. A construction manager-at-risk may seek to perform portions of the work itself if the construction manager-at-risk submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors and if the board determines that the construction manager-at-risk's bid or proposal provides the best value for the institution.

(k) The construction manager-at-risk and the board or its representative shall receive and open all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process. All bids or proposals shall be made public within seven days after the date of final selection.

(l) If the construction manager-at-risk reviews, evaluates, and recommends to the board a bid or proposal from a trade contractor or subcontractor but the board requires another bid or proposal to be accepted, the institution shall compensate the construction manager-at-risk by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the construction manager-at-risk may incur because of the board's requirement that another bid or proposal be accepted.

Sec. 51.783. **SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS**

(a) In selecting a contractor for construction, rehabilitation, alteration, or repair services for a facility through competitive sealed proposals, a board shall follow the procedures prescribed by this section.

(b) The board shall select or designate an engineer or architect to prepare construction documents for the project. The selected

or designated engineer or architect has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, Vernon's Texas Civil Statutes), as applicable. If the engineer or architect is not a full-time employee of the institution, the board shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

(c) The board shall provide or contract for, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the institution. The board shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(d) The board shall prepare a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other information that contractors may require to respond to the request. The board shall state the selection criteria in the request for proposals. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the contractor.

(e) The board shall publish notice of the request for proposals in a manner prescribed by the board.

(f) The board may provide for prequalifying offerors before proposals are submitted. Prequalification may not be a conclusive determination that an offeror offers the best value to the institution, and a prequalified offeror may be rejected on the basis of subsequently discovered information. A failure to prequalify does not bar a subsequent determination that an offeror offers the best value to the institution with respect to a given proposal.

(g) The board shall receive, publicly open, and read aloud the names of the offerors and the monetary proposals, if any, stated in each proposal. Within 45 days after the date of opening the proposals the board shall evaluate and rank each proposal submitted in relation to the published selection criteria.

(h) The board shall select the offeror that offers the best value to the institution based on the published selection criteria and on its ranking evaluation. The board and its engineer or architect may discuss with the selected offeror options for cost reduction. If the board is unable to reach a contract agreement with the selected offeror, the board shall terminate further discussions and proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected.

(i) In determining best value for the institution, the board is not restricted to considering price alone but may consider any other factor stated in the selection criteria.

Sec. 51.784. **JOB ORDER CONTRACTS FOR FACILITIES REPAIR**

(a) An institution may award job order contracts for the minor repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of predescribed and prepriced tasks.

(b) The board shall advertise for, receive, and publicly open competitive sealed proposals for job order contracts based on time and material rates for various types and classifications of work. The rates under a job order contract shall be in effect for at least six months and for not longer than two years.

(c) The board may require offerors to submit additional information besides rates, including experience, past performance, and proposed personnel and methodology.

(d) The board may award job order contracts to one or more contractors based on price proposals, experience, past performance, proposed personnel and methodology, safety record, and other appropriate factors.

(e) An order for a job or project under the job order contract must be signed by the board's representative and the contractor. The order may be a fixed price, lump-sum contract based on a statement of work negotiated between the board or its representative and the contractor, or the order may be a unit price order based on estimated quantities. The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.

APPENDIX 3

Chapter 61. TEXAS HIGHER EDUCATION COORDINATING BOARD

Subchapter A. General Provisions

Sec. 61.003. **DEFINITIONS**

In this chapter:

(1) "Board" means the Texas Higher Education Coordinating Board.

(2) "Public junior college" means any junior college certified by the board in accordance with Section 61.063 of this chapter.

(3) "General academic teaching institution" means The University of Texas at Austin; The University of Texas at El Paso; The University of Texas of the Permian Basin; The University of Texas at Dallas; The University of Texas at San Antonio; Texas A & M University, Main University; The University of Texas at Arlington; Tarleton State College; Prairie View Agricultural and Mechanical College; Texas Maritime Academy; Texas Tech University; University of North Texas; Lamar University; Texas A & I University; Texas Woman's University; Texas Southern University; Midwestern University; University of Houston; Pan American University; The University of Texas at Brownsville; East Texas State University; Sam Houston State University; Southwest Texas State University; West Texas State University; Stephen F. Austin State University; Sul Ross State University; Angelo State University; Tyler State College; [FN1] and any other college, university, or institution so classified as provided in this chapter or created and so classified, expressly or impliedly, by law.

(4) "Public senior college or university" means a general academic teaching institution as defined above.

(5) "Medical and dental unit" means The University of Texas Medical Branch at Galveston; The University of Texas Southwestern Medical Center at Dallas; The University of Texas Medical School at San Antonio; The University of Texas Dental Branch at Houston; The University of Texas M.D. Anderson Cancer Center; The University of Texas Graduate School of Biomedical Sciences at Houston; The University of Texas Dental School at San Antonio; The University of Texas Medical School at Houston; the nursing institutions of The University of Texas System; and The University of Texas School of Public Health at Houston; and such other medical or dental schools as may be established by statute or as provided in this chapter.

(6) "Other agency of higher education" means The University of Texas System, System Administration; Texas Western University Museum; Texas A & M University System, Administrative and General Offices; Texas Agricultural Experiment Station; Texas Agricultural Extension Service; Rodent and Predatory Animal Control Service (a part of the Texas Agricultural Extension Service); Texas Engineering Experiment Station (including the Texas Transportation Institute); Texas Engineering Extension Service; Texas Forest Service; Texas Tech University Museum; Texas State University System, System Administration; Sam Houston Memorial Museum; Panhandle-Plains Historical Museum; Cotton Research Committee of Texas; Water Resources Institute of Texas; Texas Veterinary Medical Diagnostic Laboratory; and any other unit, division, institution, or agency which shall be so designated by statute or which may be established to operate as a component part of any public senior college or university, or which may be so classified as provided in this chapter.

(7) "Public technical institute" means the Texas State Technical College System.

(8) "Institution of higher education" means any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in this section.

(9) "Governing board" means the body charged with policy direction of any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education, including but not limited to boards of directors, boards of regents, boards of trustees, and independent school district boards insofar as they are charged with policy direction of a public junior college.

(10) "University system" means the association of one or more public senior colleges or universities, medical or dental units, or other agencies of higher education under the policy direction of a single governing board.

(11) "Degree program" means any grouping of subject matter courses which, when satisfactorily completed by a student, will

entitle him to a degree from a public senior college or university or a medical or dental unit.

(12) "Certificate program" means a grouping of subject-matter courses which, when satisfactorily completed by a student, will entitle him to a certificate, associate degree from a technical institute or junior college, or documentary evidence, other than a degree, of completion of a course of study at the postsecondary level.

(13) "Recognized accrediting agency" means the Southern Association of Colleges and Schools and any other association or organization so designated by the board.

(14) "Educational and general buildings and facilities" means buildings and facilities essential to or commonly associated with teaching, research, or the preservation of knowledge, including the proportional share used for those activities in any building or facility used jointly with auxiliary enterprises. Excluded are auxiliary enterprise buildings and facilities, including but not limited to dormitories, cafeterias, student union buildings, stadiums, and alumni centers, used solely for those purposes.

(15) "Private or independent institution of higher education" includes only a private or independent college or university that is:

(A) organized under the Texas Non-Profit Corporation Act (Article 1396- 1.01 et seq., Vernon's Texas Civil Statutes);

(B) exempt from taxation under Article VIII, Section 2, of the Texas Constitution and Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. Section 501); and

(C) accredited by a recognized accrediting agency.

APPENDIX 4

Chapter 51. PROVISIONS GENERALLY APPLICABLE TO HIGHER EDUCATION

Subchapter Z. Miscellaneous Provision

Sec. **51.907. COMPETITIVE BIDDING ON CONTRACTS** (This provision deleted by S.B. 583)

All contracts for the construction or erection of permanent improvements at an institution of higher education as defined in Section 61.003 of this code are void unless made after advertising for bids thereon in a manner prescribed by its governing board, receiving sealed competitive bids, and awarding of the contract to the lowest responsible bidder by the governing body. If a contract is to be recommended for award to other than the lowest bidder, any bidder making a lower bid than the recommended bid shall be notified of the recommendation for award and shall be allowed an opportunity prior to the award to present evidence to the board or its designated representative as to the responsibility of that bidder.

APPENDIX 5

Vernon's Texas Statutes and Codes Annotated Government Code

Chapter 2254. PROFESSIONAL AND CONSULTING SERVICES

Subchapter A. Professional Services

Sec. 2254.001. **SHORT TITLE**

This subchapter may be cited as the Professional Services Procurement Act.

Sec. 2254.002. **DEFINITIONS**

In this subchapter:

(1) "Governmental entity" means:

(A) a state agency or department;

(B) a district, authority, county, municipality, or other political subdivision of the state; or

(C) a publicly owned utility.

(2) "Professional services" means services:

(A) within the scope of the practice, as defined by state law, of:

(i) accounting;

(ii) architecture;

(iii) land surveying;

(iv) medicine;

(v) optometry; or

(vi) professional engineering; or

(B) provided in connection with the professional employment or practice of a person who is licensed as:

(i) a certified public accountant;

(ii) an architect;

(iii) a land surveyor;

(iv) a physician, including a surgeon;

(v) an optometrist; or

(vi) a professional engineer.

Sec. 2254.003. **SELECTION OF PROVIDER; FEES**

(a) A governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award:

(1) on the basis of demonstrated competence and qualifications to perform the services; and

(2) for a fair and reasonable price.

(b) The professional fees under the contract:

(1) must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations; and

(2) may not exceed any maximum provided by law.

Sec. 2254.004. **CONTRACT FOR PROFESSIONAL SERVICES OF ARCHITECT OR ENGINEER**

(a) In procuring architectural or engineering services, a government entity shall:

(1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and

(2) then attempt to negotiate with that provider a contract at a fair and reasonable price.

(b) If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural or engineering services, the entity shall:

(1) formally end negotiations with that provider;

(2) select the next most highly qualified provider; and

(3) attempt to negotiate a contract with that provider at a fair and reasonable price.

(c) The entity shall continue the process described in Subsection (b) to select and negotiate with providers until a contract is entered into.

Sec. 2254.005 **VOID CONTRACT**

A contract entered into or an arrangement made in violation of this subchapter is void as against public policy.

APPENDIX 6

Art. 249a. REGULATION OF PRACTICE OF ARCHITECTURE

* * * *

Public work; engineers

Sec. 16.

(a) To protect the public health, safety, and welfare of the citizens of the State of Texas, an architect registered in accordance with this Act must prepare the architectural plans and specifications for:

(1) a new building that is to be constructed and owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building will be used for education, assembly, or office occupancy and the construction costs exceed $100,000, or

(2) any alteration or addition to an existing building that is owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building is used or will be used for education, assembly, or office occupancy, the construction costs of the alteration or addition exceed $50,000, and the alteration or addition requires the removal, relocation or addition of any walls or partitions or the alteration or addition of an exit.

(b) This section does not prohibit an owner of a building from choosing a registered architect or a registered professional engineer as the prime design professional for a building construction, alteration, or addition project.

(c) This section does not prevent, limit, or restrict a registered professional engineer from performing any act, performance, or work that is the practice of engineering as defined by The Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes).

* * * *

APPENDIX 7

Vernon's Texas Statutes and Codes Annotated Civil Statutes

Title 52a--ENGINEERS

Art. 3271a. TEXAS ENGINEERING PRACTICE ACT

* * * *

Public Work

Sec. 19.(a) It is unlawful for this State or for any of its political subdivisions, including any county, city, or town, to engage in the construction of any public work involving professional engineering, where public health, public welfare or public safety is involved, unless the engineering plans and specifications and estimates have been prepared by, and the engineering construction is to be executed under the direct supervision of a registered professional engineer.

(b) This Act shall not apply to:

(1) a public work that involves structural, electrical, or mechanical engineering and for which the contemplated expenditure for the completed project does not exceed $8,000;

(2) a public work that does not involve structural, electrical, or mechanical engineering and for which the contemplated expenditure for the completed project does not exceed $20,000; and

(3) road maintenance or betterment work undertaken by the commissioners court of a county.

* * * *

APPENDIX 8

Texas Government Code

Section 2253.021. PERFORMANCE AND PAYMENT BONDS REQUIRED

(a) A governmental entity that makes a public work contract with a prime contractor shall require the contractor, before beginning the work, to execute to the governmental entity;

(1) a performance bond if the contract is in excess of $100,000; and

(2) a payment bond if the contract is in excess of $25,000.

(b) The performance bond is:

(1) solely for the protection of the state or governmental entity awarding the public work contract;

(2) in the amount of the contract; and

(3) conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents.

(c) The payment bond is:

(1) solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material; and

(2) in the amount of the contract.

(d) A bond required by this section must be executed by a corporate surety in accordance with Section 1, Chapter 87, Acts of the 56th Legislature, Regular Session, 1959 (Article 7.19-1, Vernon's Texas Insurance Code).

(e) A bond executed for a public work contract with the state or a department, board, or agency of the state must be payable to the state and its form must be approved by the attorney general. A bond executed for a public work contract with another governmental entity must be payable to and its form must be approved by the awarding governmental entity.

APPENDIX 9

Chapter 271. PURCHASING AND CONTRACTING AUTHORITY OF MUNICIPALITIES, COUNTIES, AND CERTAIN OTHER LOCAL GOVERNMENTS

Subchapter B. Competitive Bidding on Certain

Public Works Contracts

Sec. 271.021. **DEFINITIONS**

In this subchapter:

(1) "Component purchases" means purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

(2) "Governmental entity" means:

(A) a county;

(B) a municipality;

(C) a common or independent school district;

(D) a hospital district or authority

(E) a housing authority; or

(F) an agency or instrumentality of the governmental entities described by Paragraphs (A) through (E).

(3) "Separate purchases" means purchases, made separately, of items that in normal purchasing practices would be purchased in one purchase.

(4) "Sequential purchases" means purchases, made over a period, of items that in normal purchasing practices would be purchased in one purchase.

Sec. 271.022. **EXEMPT CONTRACT**

This subchapter does not affect a contract required to be awarded under Subchapter A, Chapter 2254, Government Code.

Sec. 271.026. **OPENING OF BIDS**

(a) Bids may be opened only by the governing body of the governmental entity at a public meeting or by an officer or employee of the governmental entity at or in an office of the governmental entity. A bid that has been opened may not be changed for the purpose of correcting an error in the bid price.

(b) This subchapter does not change the common law right of a bidder to withdraw a bid due to a material mistake in the bid.

Sec. 271.027. **AWARD OF CONTRACT**

(a) The governmental entity is entitled to reject any and all bids.

(The subsection below is not applicable to School Districts.)

(b) The contract must be awarded to the lowest responsible bidder, but the contract may not be awarded to a bidder who is not the lowest bidder unless before the award each lower bidder is given notice of the proposed award and is given an opportunity to appear before the governing body of the governmental entity or the designated representative of the governing body and present evidence concerning the bidder's responsibility.

Sec. 271.0275. **SAFETY RECORD OF BIDDER CONSIDERED**

In determining who is a responsible bidder, the governmental entity may take into account the safety record of the bidder, of the firm, corporation, partnership, or institution represented by the bidder, or of anyone acting for such a firm, corporation, partnership, or institution if:

(1) the governing body of the governmental entity has adopted a written definition and criteria for accurately determining the safety record of a bidder;

(2) the governing body has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and

(3) the determinations are not arbitrary and capricious.

Sec. 271.028. **EFFECT OF NONCOMPLIANCE**

A contract awarded in violation of this subchapter is void.

Sec. 271.029. **CRIMINAL PENALTIES**

(a) An officer or employee of a governmental entity commits an offense if the officer or employee intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of the statute that requires a contract described by Section 271.024 to be awarded on the basis of competitive bids. An offense under this subsection is a Class B misdemeanor.

(b) An officer or employee of a governmental entity commits an offense if the officer or employee intentionally or knowingly violates the competitive bidding requirements of the statute that requires a contract described by Section 271.024 to be awarded on the basis of competitive bids, other than by conduct described by Subsection (a). An offense under this subsection is a Class B misdemeanor.

(c) An officer or employee of a governmental entity commits an offense if the officer or employee intentionally or knowingly violates this subchapter, other than by conduct described by Subsection (a) or (b). An offense under this subsection is a Class C misdemeanor.

Sec. 271.030. **REMOVAL; INELIGIBILITY**

(a) The final conviction of an officer or employee of a governmental entity for an offense under Section 271.029(a) or (b) results in the immediate removal from office or employment of that person.

(b) For four years after the date of the final conviction, the removed officer or employee is ineligible:

(1) to be a candidate for or to be appointed or elected to a public office in this state;

(2) to be employed by the governmental entity with which the person served when the offense occurred; and

(3) to receive any compensation through a contract with that governmental entity.

(c) This section does not prohibit the payment of retirement or workers' compensation benefits to the removed officer or employee.